Filed 1/25/10 P. v. Morales CA2/6

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL A. MORALES, Defendant and Appellant.	2d Crim. No. B209736 (Super. Ct. No. 2007010881) (Ventura County)

Miguel Angel Sanchez Morales appeals from the judgment entered following his conviction by a jury of the second degree robbery of Rudy Cortez (count 1) and the second degree robbery of Javier Aguilar (count 2). (Pen. Code, §§ 211, 212.5.)[1] As to count 2, appellant admitted an allegation that he had personally used a firearm. (§ 12022.5, subd. (a).) Appellant was sentenced to prison for seven years.

As to both counts, appellant contends that the evidence is insufficient to show the asportation element of robbery. As to the robbery of Aguilar (count 2), appellant contends that the evidence is insufficient to show the force or fear element. Appellant's remaining contentions are: (1) the trial court committed several errors in its instructions to the jury, and (2) he is entitled to additional presentence custody and conduct credits. Only the last contention has merit. We modify the judgment to reflect the correct number

[1] All statutory references are to the Penal Code.

of days of presentence custody and conduct credits. We affirm the judgment in all other respects.

Facts

Rudy Cortez was the manager of a Warehouse Shoe Sale store in Oxnard. Javier Aguilar was employed by the store as a "security loss prevention officer." One of Aguilar's responsibilities was to assure that customers who exited the store had a valid receipt for store merchandise.

Appellant and a bald-headed man entered the store. Appellant took off his old shoes, removed a pair of new shoes from a shoebox, and put the new shoes on his feet. He then put his old shoes inside the shoebox, placed the shoebox on a shelf, and started to walk towards the front of the store. Cortez followed behind appellant and tried to attract his attention, but appellant ignored Cortez. When appellant was about two feet away from the exit door, Cortez confronted him and said, "[A]re you going to pay for the shoes?" Appellant replied, "I ain't paying for shit." Appellant lifted up his shirt, and Cortez saw the butt of a handgun in the middle of his waistband Cortez said, "You are really going to shoot me for those shoes?" Appellant lifted his shirt again, put his hand on the gun, and said, "If I feel like it, I'll shoot you and him." When appellant said "him," he gestured toward Aguilar, who was standing about 10 feet away.

Cortez wanted to stop appellant from removing the gun from his waistband. Cortez put his hand on top of appellant's hand, which was grasping the gun, and "pushed [appellant's hand] down towards his waistband." Cortez wrapped his other arm around appellant in a "bear hug" and threw appellant to the floor. Cortez landed on top of him. Appellant yelled three or four times to the bald-headed man, "[G]et the gun, and shoot him." The bald-headed man kicked Cortez three or four times in the head and punched him in the face. The bald-headed man told "everybody to get back" and said, "I have a gun too."

Cortez and appellant struggled on the floor until appellant let go of the gun. Cortez removed the gun from appellant's waistband and stood up. The bald-headed man

ran out of the store. Cortez and Aguilar together kept appellant restrained down on the floor until the police arrived.

Late Filing of Notice of Appeal

Appellant was sentenced on May 21, 2008. The last day for filing the notice of appeal was Monday, July 21, 2009. (See Cal. Rules of Court, rule 8.308(a) ["a notice of appeal . . . must be filed within 60 days after the rendition of judgment"].) The Clerk of the Superior Court of Ventura County received and filed the notice of appeal on July 24, 2008, three days after the 60-day deadline. The clerk did not have the authority to file the late notice of appeal. (See Cal. Rules of Court, rule 8.308(d) ["The superior court clerk must mark a late notice of appeal 'Received [date] but not filed,' notify the party that the notice was not filed because it was late, and send a copy of the marked notice of appeal to the district appellate project"]; see also *People v. Lyons* (2009) 178 Cal.App.4th 1355.)

This court asked the parties to file supplemental letter briefs on whether the appeal should be dismissed for appellant's failure to timely file a notice of appeal, or whether we should deem the notice of appeal to have been constructively filed in a timely manner. (See *In re Jordan* (1992) 4 Cal.4th 116, 121 ["Unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal"]; *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 666-667 [" 'If it appears that the appeal was not taken within the 60-day period, the court has no discretion but must dismiss the appeal of its own motion even if no objection is made' "].)

Appellant attached to his supplemental letter brief a declaration under penalty of perjury from his trial counsel. Counsel declared that, at the time of appellant's sentencing on May 21, 2008, he "promised [appellant] that [he] would timely file a Notice of Appeal." (Declaration, p. 1) Counsel further declared that he "spoke with [appellant's] sister Aracely Morales on more than one occasion prior to the time the Notice of Appeal was due to be filed, and she reminded [him] . . . that [appellant] did indeed want to appeal and that he was relying on [counsel] to file a Notice of Appeal." However, "[b]ecause of

the extreme press of business, [counsel] inadvertantly [*sic*] filed a late Notice of Appeal on [appellant's] behalf."

Respondent concedes that, based on trial counsel's declaration, appellant is entitled to relief pursuant to the doctrine of constructive filing as set forth in *In re Benoit* (1973) 10 Cal.3d 72. We accept the concession. In *Benoit* our Supreme Court "extended the principle of constructive filing . . . 'to situations wherein an incarcerated criminal appellant has made arrangements with his attorney for the filing of a timely appeal and has displayed diligent but futile efforts in seeking to insure that the attorney has carried out his responsibility.' " (*In re Chavez* (2003) 30 Cal.4th 643, 657.) The *Benoit* court "held that such efforts, if undertaken in a timely manner, were *in themselves* tantamount to actual filing of a timely appeal." (*Hollister Convalescent Hosp., Inc. v. Rico*, *supra*, 15 Cal.3d at p. 669.) Accordingly, we deem the notice of appeal to have been constructively filed in a timely manner.

Sufficiency of the Evidence

" 'When reviewing a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence - that is, evidence that is reasonable, credible, and of solid value - from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Lewis* (2009) 46 Cal.4th 1255, 1289.)

Asportation

Appellant contends that the evidence is insufficient to show the asportation element of robbery. " 'The taking element of robbery has two necessary elements, gaining possession of the victim's property and asporting or carrying away the loot.' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 852.) "To satisfy the asportation requirement for robbery, 'no great movement is required, and it is not necessary that the property be taken out of the physical presence of the victim.' [Citation.] '[S]light movement' is enough to satisfy the asportation requirement. [Citations.] . . . [I]ndeed, even where the only movement was the victim placing money into a paper bag, courts

have found sufficient asportation to justify a conviction for robbery. [Citation.]" (*Id.,* at pp. 852-853.)

Here, the asportation element was met when appellant put on the new shoes and walked to the front of the store. Appellant contends that the asportation element was not met "because, by the nature of the item and scenario in question, a pair of shoes tried on and worn by appellant inside a shoe store, appellant was entitled to 'move' the shoes, to walk around in them." But appellant was not entitled to "walk around in them" with the intent of exiting the store without paying for the shoes. A reasonable trier of fact could have found that appellant had such an intent. Substantial evidence, therefore, supports the asportation element of robbery.

Force or Fear

" '[T]he central element of the crime of robbery [is] the force or fear applied to the individual victim in order to deprive him of his property.' " (*People v. Scott* (2009) 45 Cal.4th 743, 756.) Appellant contends that, as to the robbery of Aguilar (count 2), the evidence is insufficient to support the force or fear element because Aguilar "was merely a bystander" and "no force or fear was applied to [him]." (AOB 14-15) "Two or more persons may be in joint constructive possession of a single item of personal property, and multiple convictions of robbery are proper if force or fear is applied to multiple victims in joint possession of the property taken. [Citation.]" (*Id.*, at p. 750.)

Because Aguilar was employed by the store as a security loss prevention officer, he was in constructive possession of the shoes taken by appellant. (*People v. Scott*, *supra,* 45 Cal.4th at p. 751.) A reasonable trier of fact could have found that appellant and his accomplice (the bald-headed man) used applied force or fear to Aguilar. When appellant lifted up his shirt, Aguilar was only about 10 feet away and saw the gun in appellant's waistband. Appellant threatened to shoot Aguilar as well as Cortez.. Aguilar testified that he was "shocked" and "scared." He thought that "we [Aguilar and Cortez] were going to get shot." While Cortez and appellant were struggling on the floor, appellant's accomplice told Aguilar "that he was going to shoot [Aguilar] if [Aguilar] didn't . . . get back." Aguilar "jumped back away from [the accomplice] because he lifted

up his shirt like if he had [a gun], too." Accordingly, substantial evidence supports appellant's conviction for the robbery of Aguilar.

Jury Instructions

Robbery

The trial court instructed the jury on the elements of robbery pursuant to CALCRIM No. 1600. Appellant contends that the instruction on the asportation element of robbery was misleading because it "would allow the jury to find guilt without resolving the issue of when the intent to steal was formed, if at all, and would allow a finding of guilt at appellant's first step." This contention is meritless. The instruction stated that the People must prove that appellant intended to permanently deprive the owner of the property taken and that appellant formed this intent "before or during the time he used force or fear."

Appellant further contends that the jury instruction on the force or fear element was misleading because it "allows anyone nearby to be considered a victim of a separate robbery even if no force or fear was directed toward them." According to appellant,"the instruction should state that the force or fear must be directed toward each separate victim." The instruction in question provided: "A store employee may be robbed if property of the (store) is taken, even though he or she does not own the property and was not, at that moment, in immediate physical control of the property. If the facts show that Rudy Cortez and/or Javier Aguilar was a representative of the owner of the property and the Warehouse Shoe Sale expressly or implicitly had authority over the property, then Rudy Cortez and/or Javier Aguilar may be robbed if property of the store was taken by force or fear. [¶] Fear, as used here, means fear of injury to the person himself or immediate injury to someone else during the incident."

Appellant in effect is arguing that the instruction failed to define the term "force or fear" as meaning "the force or fear applied to the individual victim in order to deprive him of his property." (*People v. Ramos* (1982) 30 Cal.3d 553, 589, reversed on other grounds by *California v. Ramos* (1983) 463 U.S. 992 [103 S.Ct. 3446, 77 L.Ed.2d 1171]. His argument constitutes a claim that the instruction was incomplete or needed

clarification. The argument has been forfeited because appellant did not request an amplifying or clarifying instruction in the trial court: " 'A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial.' [Citation.]" (*People v. Cleveland* (2004) 32 Cal.4th 704, 750.)

Even if instructional error had occurred, the error would have been harmless beyond a reasonable doubt. Appellant does not dispute that force or fear was applied to Cortez. As discussed in the preceding section on sufficiency of the evidence, the evidence clearly establishes that force or fear was also applied to Aguilar.

Lesser Included Offense

The trial court intended to read appellant's Special Instruction No. 2 to the jury, but it failed to do so. Special Instruction No. 2 was a modified version of CALCRIM No. 3517. It provided: "If all of you find that the defendant is not guilty of a greater charged crime, you may find him guilty of a lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. A Defendant may not be convicted of a greater and lesser crime for the same conduct. [¶] Theft by Larceny is a lesser crime of Robbery charged in Count 1. [¶] Theft by Larceny is a lesser crime of Robbery charged in Count 2. [¶] It is up to you to decide the order in which you consider each crime and the relevant evidence, but I can accept a verdict of guilty of a lesser crime only[] if you have found the Defendant not guilty of the corresponding greater crime."

Appellant contends that the trial court committed reversible error by failing to read Special Instruction No. 2 to the jury. But appellant concedes that "this missing instruction was contained in the packet of instructions given to the jury, at the very back."[2] Because appellant's written Special Instruction No. 2 was provided to the jury, the trial court's failure to read the instruction to the jury was harmless error. "It is generally presumed that the jury was guided by the written instructions [given to the jury

[2] Special Instruction No. 2 was placed in its proper order: directly after the instruction explaining the elements of the lesser included offense of theft by larceny.

for its deliberations]. [Citation.] We indulge that presumption here." (*People v. Davis* (1995) 10 Cal.4th 463, 542; see also *People v. Osband* (1996) 13 Cal.4th 622, 717 ["as long as the court provides the jury with the written instructions to take into the deliberation room, they govern in any conflict with those delivered orally"]; (*People v. McLain* (1988) 46 Cal.3d 97, 115 [court presumed "the jury was guided by the written instructions" where court found nothing in the record "to rebut that presumption"]; (*People v. Rodriguez* (2000) 77 Cal.App.4th 1101, 1113 ["as long as the court provides accurate written instructions to the jury to use during deliberations, no prejudicial error occurs from deviations in the oral instructions"].)

We know that the jury did not disregard the packet of written instructions. During deliberations, the jury wrote a note to the court requesting "[c]larification of the term 'fear' as described in the jury instructions where it is *written* 'Fear, as used here, means fear of injury to the person himself or immediate injury to someone else present during the incident.' " (Italics added.)

Relying on *People v. Murillo* (1996) 47 Cal.App.4th 1104, 1107, appellant argues that, "where the trial court fails to read an instruction it has agreed to give, it must be assumed that the jurors did not read the written copy, hence, that the instruction was not given at all." In *Murillo* the trial court indicated that it would give a particular instruction, but it did not read the instruction to the jury. After the jury had left the courtroom, defense counsel brought this omission to the court's attention. Over defense counsel's objection, the trial court "did not recall the jury and read the instruction aloud, for fear of drawing undue attention to it." (*Id*., at p. 1107.) Instead, the court included it in the written packet of instructions provided to the jury. The appellate court concluded: "Because it is not possible to determine if the jurors actually read their written copy of [the instruction], we must assume they did not, and approach the case as though the instruction was not given at all." (*Ibid*.)

Murillo is distinguishable. Here, unlike *Murillo*, appellant never objected to the trial court's failure to orally instruct the jury pursuant to his Special Instruction No. 2. Furthermore, the reasoning of *Murillo* is questionable because it ignores the presumption

that the jury was guided by the written instructions, not the instructions as orally given by the court. (*People v. Davis*, *supra*, 10 Cal.4th at p. 542.)

Even if we were to assume that the jury did not read appellant's Special Jury Instruction No.2, the trial court's error would still be harmless. "Under the state law standard of prejudice, [appellant] must show a reasonable probability that the [omission of the instruction on the lesser included offense of larceny] affected the outcome. [Citation.]" (*People v. Sakarias* (2000) 22 Cal.4th 596, 620.) Appellant cannot meet this burden because as to both victims the evidence clearly established the force or fear element of robbery. "Robbery is 'larceny aggravated by the use of force or fear to accomplish the taking of property from the person or presence of the possessor.' [Citation.]" (*People v. Magallanes* (2009) 173 Cal.App.4th 529, 536.) "[E]ven assuming the failure to instruct on this lesser offense violated federal constitutional rights, we would find the error harmless beyond a reasonable doubt. [Citation.]" (*People v. Sakarias*, *supra*, 22 Cal.4th at p. 621, fn. omitted.)

CALCRIM NO. 361

CALCRIM No. 361 is inapplicable here because appellant did not testify. It provides: "If the defendant failed in his [her] testimony to explain or deny evidence against him [her], and if he [she] could reasonably be expected to have done so based on what he [she] knew, you may consider his [her] failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove each element of the crime beyond a reasonable doubt. [¶] If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure."

The trial court did not read CALCRIM No. 361 to the jury, but the instruction was included in the packet of written instructions provided to the jury. Appellant contends that the packet's inclusion of this instruction constituted reversible error.[3]

[3] In contrast to appellant's assumption that the jury did not read his Special Instruction No. 2, here appellant assumes that the jury read CALCRIM No. 361 even though the trial court did not orally refer to the instruction. Appellant cannot have it both ways.

The packet's erroneous inclusion of CALCRIM No. 361 was harmless beyond a reasonable doubt. Any reasonably intelligent juror would have understood that the instruction was inapplicable because appellant did not testify. The trial court instructed the jurors that they cannot draw any adverse inference from appellant's decision not to testify: "The defendant has the absolute right not to testify. He or she may rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt. Do not consider for any reason at all the fact that the defendant did not testify. Do not discuss that fact during your jury deliberation or let it influence your decision in any way." " ' "[W]e must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." [Citation.]' [Citation.]" (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088; see also *People v. Richardson* (2008) 43 Cal.4th 959, 1028.)

CALCRIM No. 226

CALCRIM No. 226 instructs the jury on factors that it may consider in judging the credibility of a witness. The trial court read to the jury only the relevant portions of this instruction. But the packet of written instructions provided to the jury included the following irrelevant excerpt from CALCRIM No. 226 on character evidence: "If the evidence establishes that a witness's character for truthfulness has not been discussed among the people who know him or her, you may conclude from the lack of discussion that the witness's character for truthfulness is good." This excerpt was irrelevant because there was no evidence showing the lack of such a discussion as to any witness. "It is error for a court to give an 'abstract' instruction, i.e., 'one which is correct in law but irrelevant[.]' [Citation.]" (*People v. Rowland* (1992) 4 Cal.4th 238, 282.)

Appellant argues that the inclusion of this irrelevant excerpt from CALCRIM No. 226 was prejudicial error because it "invited [the jury] to conclude that, because they had heard nothing about Aguilar's reputation for truthfulness, that reputation was good." We disagree. Since there was no evidence showing a lack of discussion of Aguilar's character for truthfulness among the people who knew him, any reasonably intelligent

juror would have understood that the excerpt in question was inapplicable. The error, therefore, was harmless beyond a reasonable doubt.

Credit for Time Served

The abstract of judgment reflects that appellant is entitled to total credit for time served of 481 days, consisting of 423 days of actual presentence custody plus 58 days of conduct credit. Appellant contends, and respondent concedes, that appellant is entitled to total credit for time served of 491 days, consisting of 427 days of actual presentence custody plus 64 days of conduct credit.

We accept respondent's concession. Although appellant was in custody for 10 days from March 22 through March 31, 2007, the probation report erroneously allocated only 6 days of actual custody credit for this period. Thus, the correct total actual custody figure is 427 days, not 423 days as stated in the probation report. Pursuant to section 2933.1, appellant is entitled to a conduct credit of no more than 15 percent of his presentence confinement. Fifteen percent of 427 days is 64 days.

Disposition

The judgment is modified to show a total credit for time served of 491 days, consisting of 427 days of actual presentence custody plus 64 days of conduct credit. In all other respects, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

YEGAN, Acting P.J.

We concur:

COFFEE, J.

PERREN, J.

Bruce A. Young, Judge

Superior Court County of Ventura

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